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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. STARKIST CO., Defendant.	CASE NO. 18-CR-0513 EMC **STARKIST CO.'S RESPONSE TO UNITED STATES OF AMERICA'S SENTENCING MEMORANDUM** Judge: Hon. Edward M. Chen Date: June 12, 2019 Courtroom: 5 – 17th Floor

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I. INTRODUCTION

Defendant StarKist Co. ("StarKist") has accepted responsibility for its participation in this price-fixing conspiracy, instituted enhanced compliance training for its employees, and made substantial progress in compensating its customers for the conduct charged in this case. Far from attempting to "escape punishment" as the Department of Justice ("DOJ") contends, StarKist has committed to pay at least a $50 million dollar criminal fine, which is double the fine leveled against Bumble Bee, a co-conspirator that played a longer and more substantial role in the conspiracy. StarKist has also already agreed to pay [redacted] through civil settlements with its customers. Indeed, it is concern for paying the remaining civil Plaintiffs that animates StarKist's argument for a reduction based on inability to pay. The Company does not expect a windfall. To the contrary, StarKist proposed to DOJ that, in the unlikely event that the remaining civil claims are settled for less than the $50 million at issue here, the remainder revert to DOJ in the form of a fine. DOJ rejected that proposal, and now argues that StarKist is "manipulating" figures, paying "disguised dividends," and "grossly inflating" estimates in what DOJ views as an effort to avoid "atoning for its criminal conduct." Nothing could be further from the truth. StarKist has been transparent about the health of its industry and DOJ has full access to all of its sales data and accounting records. There is nothing deceptive about StarKist's request: StarKist simply cannot pay a $100 million dollar fine, make full restitution to civil plaintiffs, and remain viable in the packaged tuna industry.

StarKist has no interest in engaging with DOJ's inflammatory rhetoric, but it must bring to the Court's attention DOJ's inexplicable withholding, and belated disclosure, of relevant and exculpatory information relating to DOJ's expert's analysis. First, the report by Dr. Zuehls referenced in DOJ's Sentencing Memorandum is *not* the same report by Dr. Zuehls that DOJ presented to the Probation Office. The most recent version of Dr. Zuehls' report, which was submitted to the Court on May 15 as ECF No. 52-1, was—to our knowledge—never disclosed to the Probation Office, and it was not disclosed to the Company until after StarKist had already lodged its Sentencing Memorandum with the Court earlier the same day. DOJ does not explain

why Dr. Zuehls changed his report or why it did not disclose the new report until the filing of its Sentencing Memorandum. DOJ's delay is unfair and disappointing.

Second, with respect to Dr. Zuehls' first report dated January 14, 2019,[1] StarKist repeatedly asked DOJ to produce the data underlying Dr. Zuehls' "iterations" and any other analysis he relied upon so that the Company could understand, evaluate, and test his claims. DOJ refused without explanation.[2] Now, in its Sentencing Memorandum, DOJ misleadingly states that "the government has provided StarKist with these iterations and as well as the iterations Zuehls performed in evaluating the ability to pay of Bumble Bee." U.S. Sentencing Mem. at 5, fn 3, ECF No. 51. This footnote fails to acknowledge that DOJ served these materials on StarKist at 6:15 p.m. the very same day it filed its Sentencing Memorandum, May 15, 2019, *after* StarKist had already lodged its Sentencing Memorandum with the Court earlier that day. DOJ's gamesmanship has denied StarKist the opportunity to meaningfully rebut Dr. Zuehls' claims to the Probation Office and the Court in a timely manner. Nevertheless, StarKist and its expert have now analyzed the new May 14, 2019 Zuehls Report and the new data. Unsurprisingly, much of the late-produced data supports StarKist's inability-to-pay arguments. And once errors in Dr. Zuehls' iterations are corrected, Dr. Zuehls' iterations strongly support a finding of an inability to pay. That DOJ withheld both the results of Dr. Zeuhls' iterations and his updated report from the Probation Office, is yet another reason (in addition to the others noted in StarKist's Sentencing Memorandum and the reasons set forth below) that the Court should not rely upon the conclusion in the Presentence Investigation Report that StarKist can pay a fine of $100 million.

Finally, and most importantly, nothing in Dr. Zuehls' new May 14, 2019 Report changes the salient facts. StarKist is facing serious financial difficulty and is operating in a struggling industry—the same industry as Bumble Bee, for which Dr. Zuehls curiously used a significantly

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[1] The first time that DOJ shared a version of its expert's analysis with StarKist was when DOJ disclosed Dr. Zuehls' report dated January 14, 2019. *See* Declaration of Niall E. Lynch in Support of StarKist's Response to U.S. Sentencing Mem. ("Lynch Decl. ISO Response") at ¶ 3.

[2] Decl. of Niall E. Lynch in Support of StarKist Co.'s Sentencing Mem. and Req. for Evid. Hr'g. ("Lynch Decl. ISO Sentencing Mem."), Ex. 5, ECF No. 54.

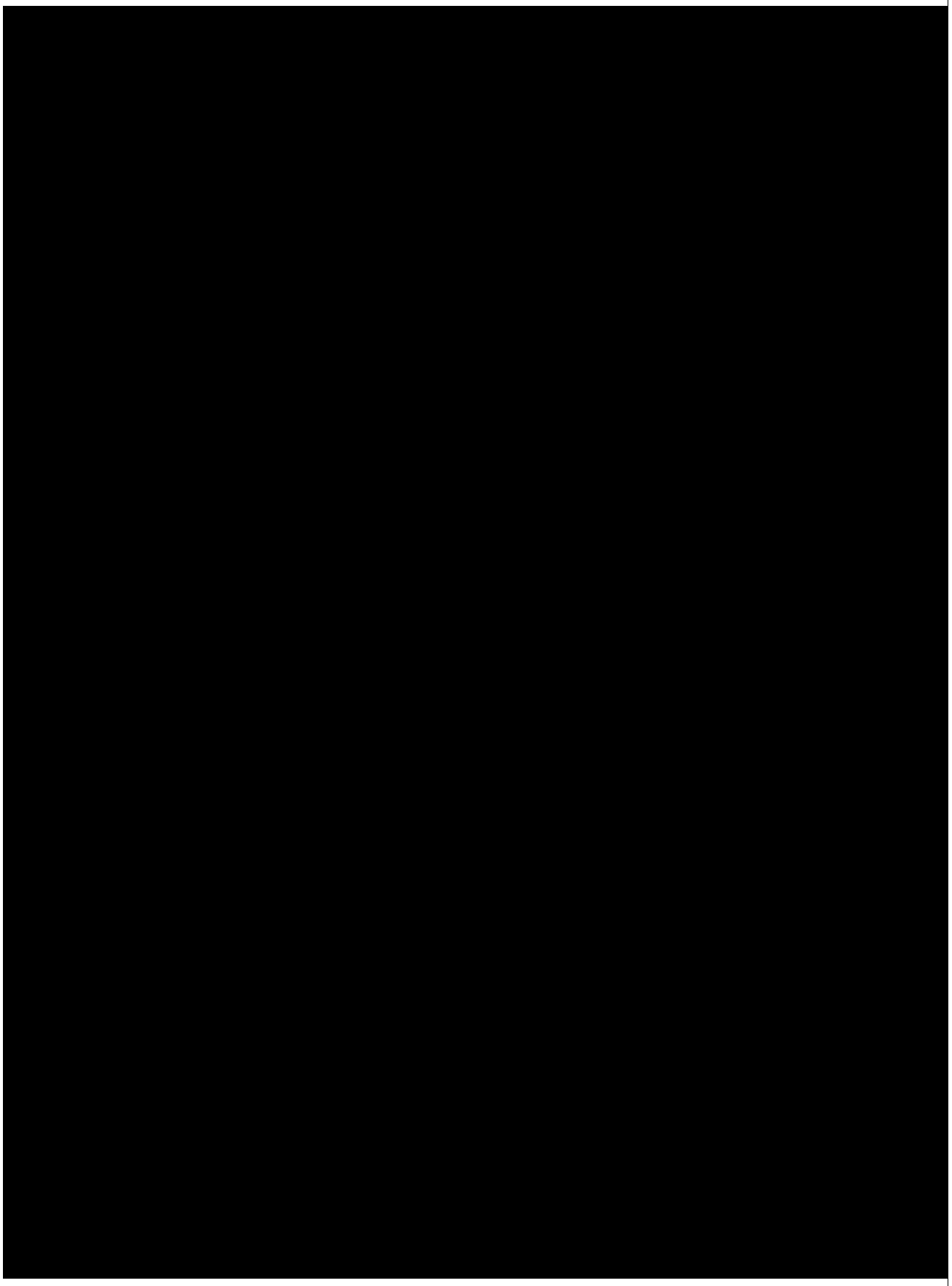
lower growth projection and higher civil damages estimates in his inability-to-pay analysis. Despite DOJ's claims that StarKist can borrow its way out of its financial situation, StarKist is contractually prohibited by its current lenders from borrowing any additional money for any purpose. The Court has the authority, and the statutory duty, to lower fines where a Company shows by a preponderance of the evidence that the criminal fine will impair its ability to make restitution or substantially jeopardize the ongoing viability of the organization. *See* 18 U.S.C. § 3572(b); U.S.S.G. § 8C3.3. To order a $100 million fine here would defeat the purpose of the antitrust laws under which StarKist was prosecuted—rather than protecting the market, it would redistribute money away from victims toward the government and markedly *reduce* competition in the packaged tuna industry. Thus, for the reasons set out in its Sentencing Memorandum and as set forth below, StarKist respectfully requests a criminal fine of $50 million, paid in reasonable installments over five years, without interest.

II. DISCUSSION

A. Nearly One Third of Dr. Zuehls' Analyses Show that StarKist Is Unable to Pay[3]

[redacted]

[3] DOJ refers to Dr. Zuehls several times as an "independent" expert, despite the fact that he was retained by DOJ in this case and apparently in at least forty other matters. As a retained expert, Dr. Zuehls is no more or less independent than Rajiv Gokhale, the expert retained in this matter by StarKist. There is nothing inherently wrong about the Government retaining an expert—but to insist that an expert who DOJ has retained over forty times is somehow more independent than the expert StarKist has retained once is simply wrong.



[redacted]

* * *

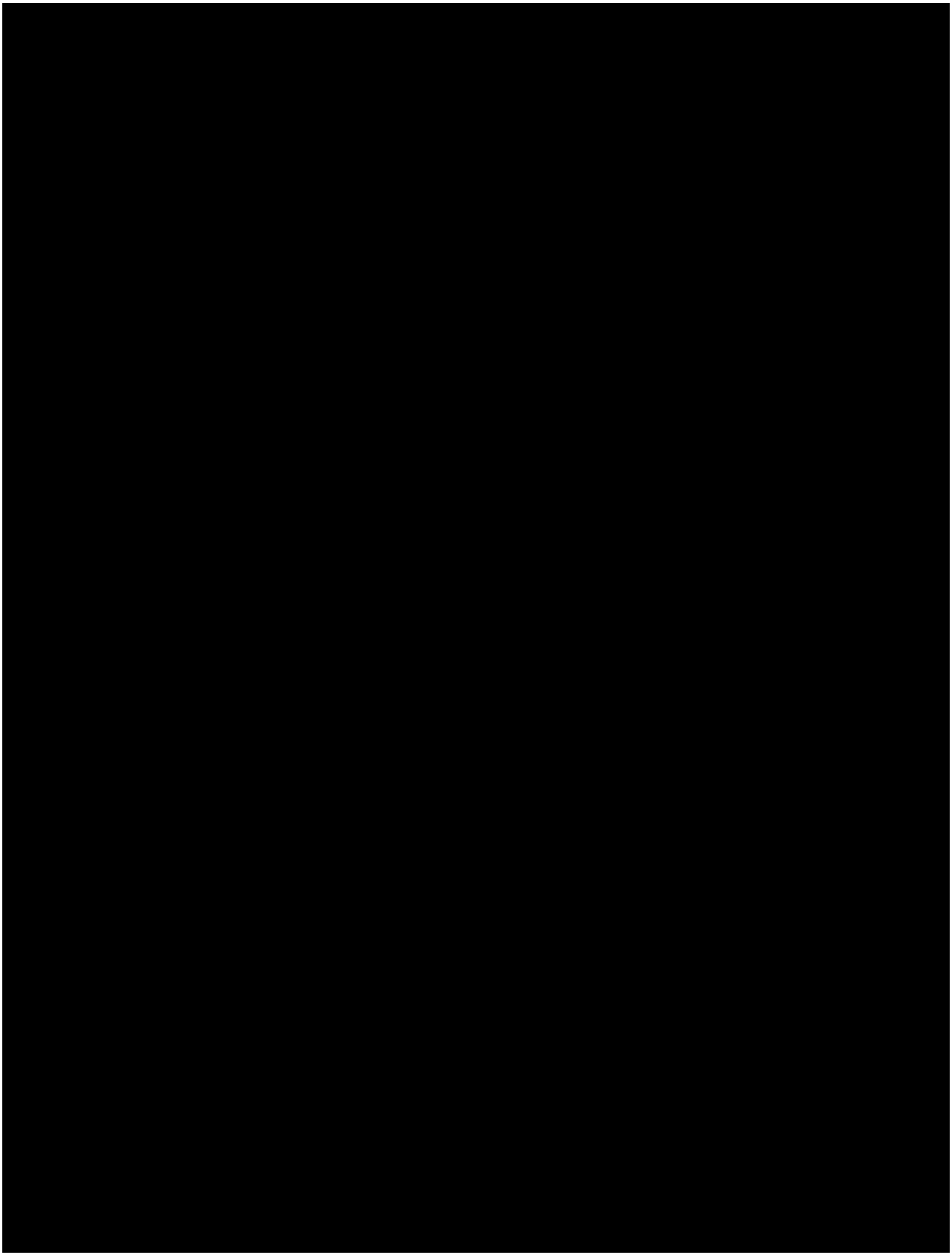
[redacted] What actually remains is a factual dispute about the validity of the assumptions regarding future growth, the possibility of additional debt financing, and the

amount of expected civil damages. With these fundamental factual assumptions in dispute, an evidentiary hearing is necessary. Even without such a hearing, StarKist carries its burden by a preponderance of the evidence on each of these issues, as discussed below.

C. StarKist's Ability to Pay Analysis Is Reliable

1. StarKist's Growth Estimate Is Reasonable

[redacted]



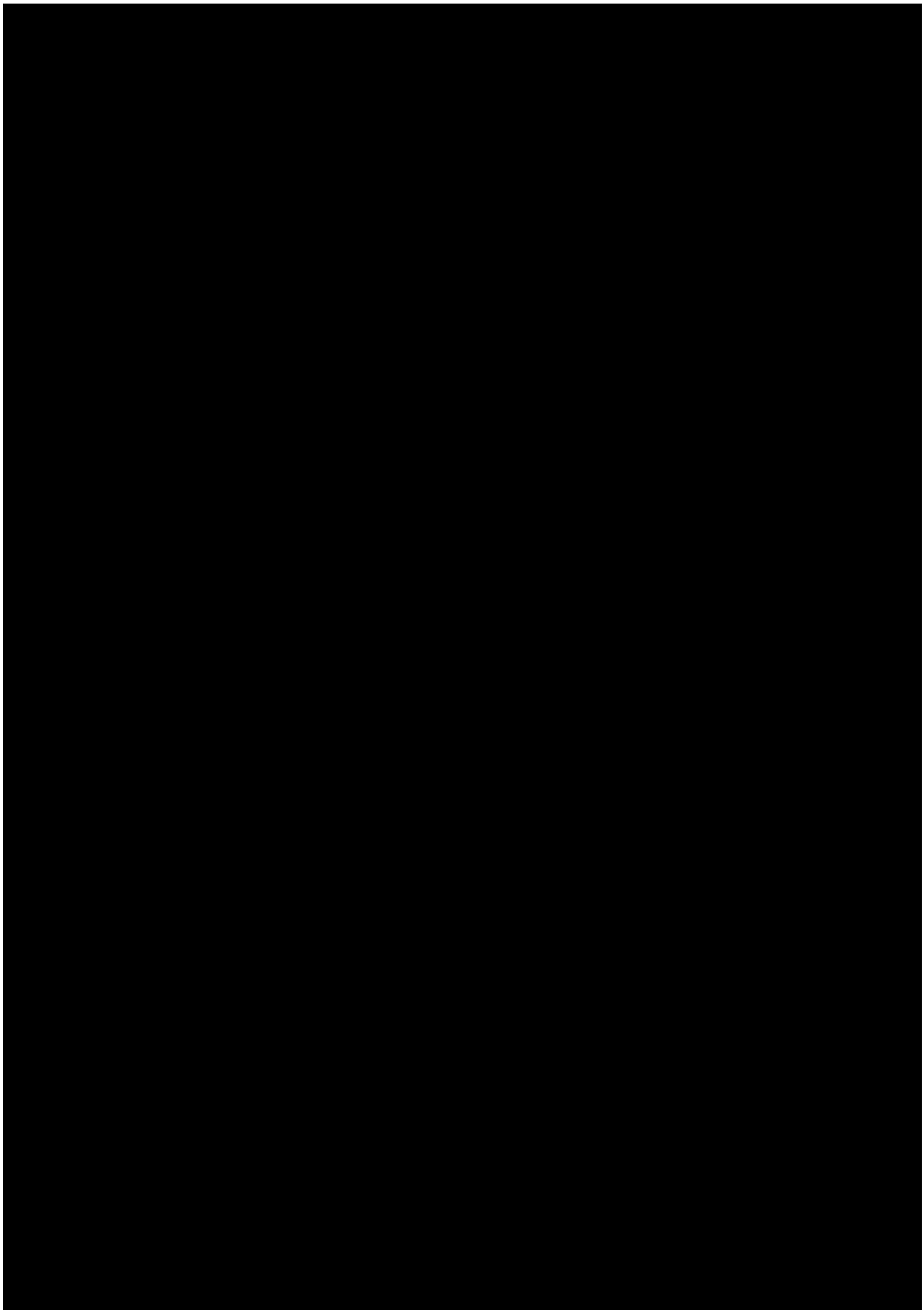
[4] Lynch Decl. ISO Response, Ex. 5 at ¶ 6.

[redacted]

Dr. Zuehls concluded that Bumble Bee's fine should be lowered from $81.5 million to $25 million based on its inability to pay. U.S. Sentencing Mem. and Mot. for Departure at 14, *United States v. Bumble Bee Foods, LLC*, No. 17-CR-249, ECF No. 25 (relying on Dr. Zuehls' report to conclude that "$25 million without interest represents the fine that Bumble Bee can pay without substantially jeopardizing its continued viability"). [redacted]

[redacted]

[redacted]



[redacted]

[redacted]

[redacted]

4. StarKist's Civil Liability Estimate Is Reasonable

In the same filing that accuses StarKist of "grossly inflat[ing] its hypothetical future civil damages" and postulates that "every defendant will hypothesize a future financial catastrophe to avoid payment of the guidelines fine," DOJ acknowledges that StarKist has recently revised its estimated civil exposure *downward*. U.S. Sentencing Mem. at 15. StarKist's revised settlement estimate is clearly at odds with DOJ's theory that the Company is manipulating numbers to avoid a criminal fine. [redacted] As noted in their submission in this matter, one of the civil classes consists of Indirect Purchaser End Payer Plaintiffs ("EPPs") who allege that StarKist is jointly and severally liable for over [redacted] which they claim direct purchasers passed through to them. *See* Indirect Purchaser End Payer Pls.' Statement in Connection with Def. StarKist Co.'s Evid. H'rg Pursuant to the CVRA at 3. [redacted] Further, the other putative class of indirect

purchaser commercial food preparers ("CFPs") recently filed a motion for preliminary approval of a settlement with Chicken of the Sea valued at $6,500,000. *See* Commercial Food Preparer Pls.' Mot. for Prelim. Approval of Proposed Settlement with Tri-Union Seafoods LLC D/B/A Chicken of the Sea International and Thai Union Group PCL and Provisional Certification of Settlement Class, *In re Packaged Seafood Products Antitrust Litigation*, 15-MD-2670-JLS-MDD (S.D. Cal.), ECF No. 1910. [redacted]

As noted above, Dr. Zuehls' civil damages estimate is also inaccurate because it fails to account for StarKist's joint and several liability with its co-conspirators. Under the Sherman Act, StarKist is vulnerable to lawsuits and damages based not only on its own sales, but also on the sales of the other participants in the conspiracy, Bumble Bee and Chicken of the Sea. Under 18 U.S.C. § 3664(h), courts may impose full restitution liability on each defendant, and in practice, courts often order criminal defendants to pay restitution on a joint and several basis. *United States v. Foreman*, 329 F.3d 1037, 1039 (9th Cir. 2003) (affirming an order of joint and several liability amongst defendants after a conviction for check fraud); *see also United States v. Sensmeier*, 361 F.3d 982, 991 (7th Cir. 2004) (affirming a restitution order holding co-defendants jointly and severally liable after fraud convictions). Thus, even though the executed settlements account for a large percentage of StarKist's sales, it must still negotiate with victims of the conspiracy who purchased significant amounts from StarKist's competitors. [redacted]

DOJ also argues that only portions of StarKist settlements should qualify as restitution because the alleged conspiracy periods and product definitions in the various civil suits are different from the conspiracy period and product definition in the plea agreement. [redacted]

[redacted]

[redacted] Even if StarKist had not done so, where, as here, "the crime of conviction includes a scheme, conspiracy, or pattern of criminal activity as an element of the offense, . . . the restitution order [may] include acts of related conduct for which the defendant was not convicted.'" *United States v. Thomsen*, 830 F.3d 1049, 1066 (9th Cir. 2016) (quoting *United States v. Brock-Davis*, 504 F.3d 991, 999 (9th Cir. 2007)) (internal quotation marks omitted). Thus, while the settlements entered into thus far were [redacted] it is black-letter law that criminal restitution related to a conspiracy conviction may extend beyond the conduct charged in the indictment or information. *Id*.

It bears noting that two of the classes from the civil case (Direct Purchaser Plaintiffs and EPPs) have filed statements in this criminal case. While StarKist will respond separately to those filings, the fact that class counsel felt it necessary to appear in this setting is further evidence of the magnitude of the civil liability that remains outstanding. While the Court should not countenance class counsel's attempt to use the criminal proceedings to create leverage in the civil cases, the fact they try to do so demonstrates that StarKist's estimation of civil liability is not imagined nor inflated.

Finally, and most crucially, even if the Court were to credit Dr. Zuehls' erroneous estimates and decide that [redacted] Lynch Decl., Ex. 4. While that admission is contingent upon StarKist's inability to finance its capital expenditures in American Samoa through new bank loans, such financing is not possible as explained above. Even if the Court finds (1) lower civil liability than the low end of StarKist's estimates and (2) a growth rate ten times higher than StarKist reasonably expects, DOJ's expert admits that StarKist would have established an inability to pay. *Id*.

5. StarKist Has Not "Artificially Reduced Its Assets"

DOJ next accuses StarKist of paying down its debts to "artificially" reduce its assets in an effort to avoid paying a fine. DOJ, through Dr. Zuehls, [redacted] Regardless, Dr. Zuehls ignores the obvious fact that StarKist is bound to pay down its debt based on the repayment schedule set forth in the Senior Facility Agreement. [redacted] This is not opportunistic behavior or artificially reducing assets—it is adherence to the contractual terms that lenders required, and consistent with past practices.

Relatedly, DOJ states that StarKist "has demonstrated that it will continue to do anything to avoid paying its criminal fine," citing for evidence [redacted] *Id*. at 9. DOJ's story is wrong, and its argument makes no sense. As DOJ concedes, [redacted] a year before it received a Grand Jury Subpoena. At that time, StarKist was wholly-owned by Dongwon Industries, and had no incentive to "disguise" any dividend payment to its shareholder. [redacted]

[8] *See* Decl. of Niall E. Lynch in Support of StarKist Co.'s Response to Direct Purchaser Pls.' Opening Statement Regarding StarKist's Sentencing Pursuant to the CVRA, and Indirect Purchaser End Payer Pls.' Statement in Connection with StarKist's Evid. Hr'g Pursuant to the CVRA, Ex. 1 ("Daines Report" ¶ 138).

[redacted] Daines Report ¶ 84. Professor Robert M. Daines of Stanford Law School [redacted]

D. Dongwon Industries Is Not Legally Required to Pay StarKist's Fine

"It is a general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation . . . is not liable for the acts of its subsidiaries." *United States v. Bestfoods*, 524 U.S. 51, 61 (1998). Courts will only disregard this principle in extreme circumstances—this is not such a case. *See Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1458 (2d Cir.

1995). [redacted] *See* May 14, 2019 Zuehls Report ¶ 13. DOJ similarly conceded this point in the related Bumble Bee case, despite the strong financial condition of its parent Lion Capital. U.S. Sentencing Mem. and Mot. for Departure at 14, *United States v. Bumble Bee Foods, LLC*, No. 17-CR-249-EMC, ECF No. 25 ("Bumble Bee is the only entity that the government can legally obligate to pay a criminal fine in light of the conduct under investigation."). StarKist is the only corporate entity that has been charged with a crime, and it is the only corporate entity obligated and available to pay the associated criminal fine and restitution.

Moreover, Dongwon Industries, as a publicly traded company on the Korea Stock Exchange, has a fiduciary duty to its shareholders. If it is not in the best financial interest of its shareholders to pay StarKist's criminal fine, then it is prohibited from taking such action. Given StarKist's financial condition, and the declining growth in the canned tuna market, it is unclear how it would be in its shareholders' interest for Dongwon Industries to pay StarKist's fine.

E. DOJ's Ability to Petition to Lower StarKist's Fine in the Future Is Irrelevant

Imposing a fine beyond StarKist's ability to pay on the premise that the Court can revisit the issue if StarKist's projections are in fact correct ignores clear congressional intent for certainty in sentencing. *See* 28 U.S.C. § 991(b). It also undermines Congress's decision to limit the ability of a criminal defendant to request a reduction of its fine after sentencing, leaving the option open only to DOJ. *See* 18 U.S.C. § 3573.

Forcing StarKist to rely on the potential good graces of DOJ at some point in the future increases the uncertainty that StarKist is facing. With the imposition of a $100 million fine, StarKist will have to make hard decisions assuming that the fine will not be reduced. If StarKist assumes otherwise and makes capital expenditures (assuming it could even obtain financing), it runs the risk of DOJ claiming StarKist was simply attempting to [redacted] U.S. Sentencing Mem. at 20. StarKist could not and would not take that risk. DOJ's thin argument that "every defendant will hypothesize a future financial catastrophe to avoid payment of the guidelines fine" and that StarKist "will continue to do

anything to avoid paying its criminal fine" is unfounded and easily refuted. *Id.* at 20. StarKist has accepted responsibility for its conduct, will pay a criminal fine of at least $50 million (even where such payment is already a financial hardship for the Company under its expert's projected free cash flow analysis), and continues to settle with civil plaintiffs.

StarKist has presented significant evidence that it is unable to pay a fine greater than $50 million. Even a $50 million fine raises concern for StarKist's future. An additional $50 million, even coupled with DOJ's empty promise to petition the Court should StarKist's predictions come to fruition, would be enough to drastically change StarKist's entire business model, undermine its ability to compete, and threaten its continued viability.

F. An Evidentiary Hearing Is Necessary

The dispute between the parties' experts boils down to the validity of the assumptions regarding StarKist's future growth, the possibility of additional debt financing, and the quantity of civil damages. Factual disputes of this nature are best explored through live testimony of the individuals who make and rely on these assumptions in the ordinary course of business. At the proposed evidentiary hearing, StarKist plans to call its expert, Mr. Rajiv Gokhale, and its Director of Finance, Dennis Adams, to explain the Company's LRP and the assumptions that support it. StarKist also plans to call its General Counsel, Scott Meece, to testify regarding StarKist's civil settlement estimates and certain planned capital expenditures. Furthermore, the Court and StarKist should have the opportunity to question Dr. Zuehls on the discrepancies between the industry growth assumptions applied to Bumble Bee and StarKist, as well as the many errors in his analysis. This is particularly necessary in this situation where DOJ has withheld relevant and exculpatory evidence concerning their expert's analysis. Without an evidentiary hearing, the Court will not have sufficient information to determine the credibility of Dr. Zuehls' or Mr. Gokhale's reports.

G. A $50 Million Dollar Fine Satisfies 18 U.S.C. § 3553

A fine of $50 million will also satisfy the Section 3553 factors and is more aligned with the purposes of the statute. Under Section 3553, the Court is instructed to impose a sentence that is "sufficient, but not greater than necessary" to comply with the purposes of set forth in the

statute. 18 U.S.C. § 3553(a). Particularly relevant here is the "need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct; and the need to provide restitution to any victims of the offense." *Id.* StarKist pled guilty to a shorter time period and narrower product scope than Bumble Bee or any individual defendant in this matter. Only one former employee of StarKist has been charged, while two high-ranking executives of Bumble Bee have pled guilty and Bumble Bee's former President and CEO has been indicted and awaits trial. DOJ argues that StarKist did not begin to take responsibility for its actions until Mr. Hodge, the only former employee of StarKist who engaged in the conduct at issue, entered his guilty plea. U.S. Sentencing Mem. at 22. This is not true. [redacted] Moreover, StarKist promptly accepted responsibility as soon as the conduct was apparent, and the only delay was the result of a good faith disagreement between the parties on the amount of the fine, which is now being resolved by this Court.

A $50 million dollar fine is double the fine assessed against Bumble Bee, and therefore adequately reflects the seriousness and nature of the offense and provides adequate deterrence by addressing StarKist's position as the last remaining corporate defendant to plead guilty. In addition, a $50 million fine imposed on StarKist stands in stark contrast to Chicken of the Sea, which will face no criminal fine or prosecution of its employees, despite its comparative role in the offense.[9] Finally, a $50 million fine will allow StarKist to provide restitution in the civil cases, which is the most critical factor in the inability-to-pay analysis. *See* U.S.S.G. § 8C3.3.

[redacted]

III. CONCLUSION

StarKist has demonstrated by a preponderance of the evidence that it is unable to pay a fine greater than $50 million without impacting its ability to pay restitution in the civil cases and continue as a viable competitor in the market. StarKist maintains its original request for a reduction to a $50 million fine paid out over five years in reasonable installments, without interest. But in order to ensure StarKist's ability to pay restitution and assuage any fears regarding an unjustified windfall, StarKist remains willing to allocate $50 million in future cash flows to the criminal fine and an additional $50 million in future cash flows to civil damages (as it proposed to DOJ during settlement negotiations).[10] Under such an agreement, any funds allocated to civil damages that go unused after the conclusion of the civil matters would revert to the government.

Dated: May 29, 2019

Respectfully submitted,

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[redacted]

[10] *See* Lynch Decl. ISO Response ¶ 13.